United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7351

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United States Court of Appeals

For the Second Circuit

KARL M. NEIMAND, *et al.*,
Plaintiffs-Appellees,

and

GEORGE COOPER, *et al.*,
Plaintiffs-Intervenors,

and

GEORGE SCHWARTZ, *et al.*,
Additional Plaintiffs-Intervenors,

against

MENDON PROPERTIES, INC., *et al.*,
Defendants-Appellants,

and

EUGENE RODIN, *et al.*,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT VOGEL

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976
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BRIEF OF DEFENDANT-APPELLANT VOGEL*

Statement of the Case

Defendant Vogel opposed the plaintiffs' motion below for entry of judgment against him based on his claimed

*In this brief the name Vogel refers to defendant Vogel individually and to the defendants Sy Vogel Associates, Mendon Properties, Inc., Byerly Properties, Inc., Tamerlane Properties, Inc., Parkham Development Corp., Group Administrators Corp., Cole-Hunt Development Corp. and Hardwick Properties Corp., of which he was the sole owner and on whose behalf he acted throughout.

default under a so-called "Purchase Agreement" (269a)** which purported to settle this action. Vogel's opposition was based on his having entered into this "Settlement Agreement" under the express threat of criminal prosecution if he did not do so, which necessarily included the implied promise that he would not be prosecuted if he agreed to the "Settlement Agreement." Under settled law, an agreement procured under such a threat is not enforceable. The District Court (Neaher, J.) rejected Vogel's opposition and granted the requested judgment. This appeal followed.

This action based on alleged violations of Federal securities laws was started on June 28, 1974 (2a). Prolonged settlement negotiations, from August, 1974 to July, 1975, resulted in the above so-called "Settlement Agreement" (269a). The "Settlement Agreement" is dated "as of July 17, 1975." Vogel signed the "Agreement" on or about that date, but the "Agreement" was not concluded until a closing was held on October 6, 1975 (27a). Until that date Vogel could have withdrawn his assent to the "Agreement." The "Agreement" stated expressly that the defendants did not admit "any wrongdoing on their part" (284a).

On a number of occasions during the settlement negotiations, Vogel was threatened by Bernard S. Kanton, one of the plaintiffs and also co-counsel for the plaintiffs, that unless Vogel agreed to a settlement which would be entirely satisfactory to Kanton, he (Kanton) would go to the Nassau County District Attorney and press criminal charges against Vogel and the other defendants (15a). These threats were made in the presence of other counsel for the plaintiffs, who remained silent and did not

**Numbers in parentheses refer to pages in the appendix.

disavow the threats (16a). Kanton has denied this generally but has not denied the two specific instances of such threats set forth under oath in Vogel's affidavits opposing the plaintiffs' motion for judgment based on Vogel's alleged default under the "Settlement Agreement" (53a).

Vogel opposed this motion for judgment solely on the ground that the Settlement Agreement is unenforceable because it was procured by the above express threats of criminal prosecution and the necessarily implied promise that Vogel would not be prosecuted if he entered into the "Settlement Agreement" as a settlement of the action. In opposing the motion Vogel relied on the settled rule of law that an agreement so procured is not enforceable by any party to it. The District Court (Neaher, J.) granted judgment for the plaintiffs against Vogel in the amount of $539,550.23 (98a-102a).

Questions Presented

This appeal presents the following questions:

1. Did the District Court err in holding that the facts presented to it did not constitute such duress by the plaintiffs, based on threats of criminal prosecution, as to make the "Settlement Agreement" unenforceable by the plaintiffs?

2. At the time he executed the "Settlement Agreement" did the appellant Vogel have knowledge that he was the object of the criminal investigations then in progress?

3. Did he have such knowledge at the time he performed the "Settlement Agreement"?

4. Did the District Court err in its statement that Vogel "may be said to have ratified" the "Settlement Agreement"?

5. Should the District Court have held an evidentiary hearing to establish the facts necessary for a determination of the question of duress based on threats of criminal prosecution?

6. Did the District Court err in holding that the appellant Vogel's opposition to the motion for judgment was frivolous and solely for the purpose of delay?

Facts

This action was begun on June 28, 1974 (2a). Settlement negotiations were begun in August, 1974, and continued through July, 1975. The "Agreement" as executed stated expressly that by entering into it the defendants did not admit "any wrongdoing on their part" (284a). Vogel participated in some of the negotiation meetings, between August 20, 1974 and March 4, 1975 (15a).

Threats of criminal prosecution.

Almost from the beginning of the negotiations Vogel and the other individual defendants were subjected to continuous threats of criminal prosecution and other similar action. Thus:

(a) A negotiation meeting was held on August 22, 1974, late in the afternoon, at the office of Rogers & Wells, the law firm which then represented Vogel. Among those present were Robert Larsen, of that firm; Bernard

S. Kanton, in his dual capacity as one of the intervenor-plaintiffs and as co-counsel for the plaintiffs; Stephen Lowey, his co-counsel, of the firm of Lipper, Lowey & Dannenberg; and defendants Vogel, Rodin and Boklan. At this meeting the defendants offered to rescind the entire transaction and return all moneys paid by the plaintiffs. Kanton demanded substantially more than this. When the defendants resisted this demand he became very abusive and stated that unless they agreed to a deal which would be entirely satisfactory to him he would go to the Nassau County District Attorney and press criminal charges against them; that he would file complaints against them with the SEC and the Internal Revenue Service, all of which would tie them up in investigations for a long time and might finally put them all in jail. In the case of Mr. Boklan, who is a member of the New York Bar, he also threatened to make a complaint to the "Bar Association." Although Mr. Lowey did not join in these threats, he remained silent while they were being made and never stated that he did not join in them (15a, 16a).

(b) Similar threats were repeated by Kanton at subsequent meetings which Vogel attended. At no time were these threats disavowed by Mr. Lowey or by Richard Dannenberg, who replaced him in the negotiations. On at least one such occasion Kanton took Vogel aside for a private conversation in which he told Vogel that Vogel had better agree to his terms and get the other defendants to do so, too, or else they would all be charged criminally (16a).

(c) With respect to negotiation meetings which the defendants did not attend, Vogel was informed by Mr. Larsen that similar threats were frequently referred to by Kanton if the defendants did not agree to all his terms (16a).

(d) In the spring of 1975 Vogel had an accidental meeting with Kanton at East 38th Street and 3rd Avenue. Vogel was driving past that corner when he noticed Kanton walking. It was raining at the time so Vogel stopped his car and offered Kanton a ride. Kanton's immediate reply was, "Who are you * * * lately?" Vogel asked him to stop using such obscene language. His reply was, "What's holding up the * * * settlement now? You better sign that * * * settlement or you'll be in for more trouble than you ever saw before." Vogel said, "O. K. Bernie," got back into his car and drove away (83a).

Vogel's yielding to threats.

Vogel has stated under oath (17a) that this constant barrage of threats wore him down physically and mentally to the point where he could no longer think or operate rationally or effectively. Early in July, 1975, he was given a proposed "Settlement Agreement" worked up by the attorneys. This draft was about 100 pages long, with about 40 pages of attached Schedules. As he struggled through this document he found that it provided for the following:

(a) Return to the plaintiffs and intervenor-plaintiffs of the money paid by all of them, in stated installments.

(b) Substantial interest, to be paid in the above stated installments.

(c) The deposit by him and Rodin, in escrow, of collateral worth about $3,000,000 to secure the payments due to the plaintiffs and intervenor-plaintiffs under the "Agreement."

(d) Return to the defendants of the real property previously sold to the plaintiffs, but with control over the terms of any subsequent sale by any of the defendants of any of such properties, as set forth in the "Settlement Agreement."

(e) Virtually automatic entry of judgments against the defendants for the full amounts agreed to be paid if there was a default in *one* payment.

(f) The opportunity for the plaintiffs to elect to remain in all or parts of the deal.

Although Vogel believed (and still does) that he had done absolutely nothing that was wrong throughout the entire transaction, he was nevertheless very much concerned about Kanton's repeated threats of criminal prosecution if he did not make a deal acceptable to Kanton. Therefore Vogel finally decided to sign the "Agreement," expecting that he would thereby avoid an unjust criminal prosecution, as well as the trouble of responding to investigations by the SEC and the Internal Revenue Service. He was at all times also very much concerned about the effect of such prosecution and investigations on his ability to support his large family (ten children) (18a).

Vogel's voluntary appearance before the District Attorney.

Prior to Vogel's actually signing the "Settlement Agreement" he had heard from one of the prior owners of one of the properties involved that that prior owner had been asked to come to the Nassau County District Attorney's office for a conference. However, he told Vogel that he had no information as to whether Vogel was involved in what the District Attorney was doing. Vogel nevertheless consulted with an attorney about this

and then voluntarily went to the District Attorney's office and offered to give them whatever information he could (18a).

Vogel's right to terminate the settlement.

Vogel's voluntary appearance before the District Attorney took place after he had signed the "Settlement Agreement" but before the "Agreement" was signed by all parties and delivered to the attorneys for the plaintiffs, which occurred early in October, 1975 (27a; 60a). Under Section 2.1 of the "Settlement Agreement" Vogel could have terminated that Agreement at any time after August 31, 1975 (283a). Clearly he would have done so if he had known before October 6, 1975, the closing date on the "Settlement Agreement" (60a), that a complaint had already been made *against him* to the Nassau County District Attorney on behalf of the plaintiffs, so that he could not avoid prosecution by signing the "Settlement Agreement."

Ineffective denials by Kanton.

Kanton has denied making the threats of criminal prosecution described above only in the most general terms (53a; 61a). He has not denied specifically Vogel's account of the threats made on August 22, 1974 (15a), or on the occasion of the fully described chance encounter in the rain, in the spring of 1975 (83a).

LAW

I.

A contract induced by threat of criminal prosecution is not enforceable.

The fact recital has shown clearly that Vogel executed the "Settlement Agreement" in order to avoid the criminal prosecution threatened by Kanton and not disavowed by Kanton's co-counsel. It is the long-settled law of New York that a contract induced by such threats (and the necessarily implied promise that the maker of the threats will not seek such criminal prosecution if the contract is accepted) is void and unenforceable. The leading and most frequently cited cases on this are *Union Exchange National Bank v. Joseph,* 231 N. Y. 250, 131 N. E. 905 (1921), and *Haynes v. Rudd,* 102 N. Y. 372, 7 N. E. 427 (1886).

In *Union Exchange Bank v. Joseph* the New York Court of Appeals unanimously held that payments on a series of notes could not be recovered where the defendant had given the notes in exchange for the plaintiff's promise not to press against the defendant's brother-in-law a charge of "criminal misappropriation of its funds." The Court of Appeals reached this conclusion on the basis of *Haynes v. Rudd.* Its opinion, in the limpid prose of Judge (later Supreme Court Justice) Cardozo, states:

> "We think the defendant, if a victim of duress, was at the same time a wrongdoer when he stifled a charge of crime. In such circumstances the law will leave the parties where it finds them (*Haynes v. Rudd,* 102 N. Y. 372). Neither is permitted to recover from the other. (231 N. Y. 250, 252) • • •.

> "The principle thus vindicated is simple and commanding. There is to be no traffic in the privilege of invoking the public justice of the state. One may press a charge or withhold it as one will. One may not make action or inaction dependent on a price (*Jones v. Merionethshire Bldg. Society*, 1892, 1 Ch. 173, 183)." (231 N. Y. 250, 253.)

Significant to our situation is the court's clear indication that it was considering the case as one in which the defendant sought affirmative relief, by way of a counterclaim. It very clearly pointed out that no question was before it "in respect of the adequacy of the answer considered as a defense." Vogel is here not seeking any affirmative relief, but is in effect merely asserting a defense.

Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 427 (1886), an earlier case, was one in which the plaintiff sued to recover the amount of a note which he had given to the defendant. The defendant had negotiated the note to a holder in due course and the plaintiff had paid it on maturity. He sued to recover from the defendant the amount of the note, alleging that he had given the note to the defendant "in order to compound and settle a supposed felony or misdemeanor, and that the said note was extorted from the plaintiff and his wife by threats of public charges against the character of their son and that the note was executed in fear of the same" (102 N. Y. 372, 374). The son had been in the defendant's employ and the defendant claimed he had stolen from him money represented by the amount of the note.

The trial court had refused to charge the jury that the plaintiff could not recover if the note had been given in consideration for "the compounding of a felony" (concealment of evidence of an alleged crime), or "if the motive of the plaintiff in giving the note was in part for

the purpose of compounding a felony * * *." A judgment for the plaintiff was reversed because of the failure to so charge and a new trial was ordered. The Court of Appeals said:

> "We cannot agree with the doctrine that if the plaintiff was influenced by the duress of the defendant, and at the same time both parties intended the compounding of a felony, that they were not *in pari delicto*. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect" (102 N. Y. 372, 375).

See also *Fidelity & Deposit Co. of Maryland v. Palmer,* 252 App. Div. 55, 297 N. Y. Supp. 646 (4th Dept. 1937).

There "is no distinction between an agreement to suppress the evidence of a crime *alleged* to have been committed and an agreement to suppress evidence of or to refrain from prosecuting a crime which had in fact been committed. In both cases the consideration is illegal [emphasis in original] (*Union Exchange Nat. Bank v. Joseph,* 231 N. Y. 250)." *Cantales v. Mazzei,* 190 Misc. 292, 293, 73 N. Y. S. 2d 902, 903 (1947). See also, *Cushing v. Hughes,* 119 Misc. 39, 195 N. Y. Supp. 200 (1922). There the court, citing *Union Exchange Bank v. Joseph,* said that if "the parties believed that a crime had been committed, they both were wrongdoers in agreeing to stifle prosecution and the law will not aid them but will leave them where it finds them" (119 Misc. 39, 41 195 N. Y. S. 200, 202).

The fact that in the above cases the promise to stifle prosecution was made to a third party rather than to the alleged wrongdoer does not distinguish them from our

situation. The basic principle of law still applies. An agreement "to stifle prosecution" is illegal and void and neither party to such an agreement may enforce any of the terms of that agreement nor the consideration given for that agreement. The application of this rule to our case leads to the result that the plaintiffs cannot enforce the "Settlement Agreement" against Vogel. Therefore the District Court should not have granted a judgment against him.

II.

At the time of his execution and performance of the "Settlement Agreement" Vogel did not know he was under investigation by the Nassau County District Attorney.

In disposing of the point made in I above the District Court stated that "the papers reveal that the 'threats' were effected and the investigations, of which defendants had knowledge, were commenced before the Agreement was executed and closed. Defendants also performed * * * the Agreement * * *." There is no question that the threats were made before the "Settlement Agreement" was executed, since we claim that its execution was induced by the threats. However, the papers in the Record on appeal do *not* show that Vogel knew that *he* was the subject of any criminal investigation before he executed the "Agreement," or, indeed, before he performed it.

Vogel's affidavit of May 3, 1976, states that before executing the "Agreement" he had learned that a former owner of one of the properties had been asked to come to the Nassau County District Attorney's office for a

conference and that he had no knowledge "as to whether [Vogel] was involved * * *" (18a). Thereafter Vogel consulted an attorney and then "voluntarily went to the District Attorney's office and offered to give them whatever information [he] could." Clearly, no attorney would have permitted him to make such an offer if he knew that his client was involved. Equally clearly, Vogel would not have gone *voluntarily* to the District Attorney if he knew he was involved.

Nowhere in the Record on this appeal is the lack of knowledge by Vogel contradicted at all (57a). The District Attorney's letter, which is Exhibit 4 to the Kanton affidavit (71a), is dated July 14, 1976, only three days before Vogel executed the "Settlement Agreement." It is inconceivable that in less than three days the letter could have been signed, mailed, received and brought to the attention of Vogel. Furthermore the letter mentions both Rodin and Vogel. This also is not an indication that Vogel was being investigated. Clearly Vogel and Rodin have divergent positions on the indictments. Thus, only Rodin has pleaded guilty (55a, 70a) and Vogel has pleaded not guilty (55a). When Rodin chided Vogel for not having told him that he was opposing the entry of judgment, so that Rodin could have done likewise, Vogel told him that he wanted to act on his own (84a).

Vogel "performed" the "Settlement Agreement" at the closing on October 6, 1975, by paying approximately $100,000 and by conveying in escrow his interest in certain real property set forth in the "Settlement Agreement" (373a-376a), as collateral security for his performance of his obligations under the "Settlement Agreement." Nowhere in the Record on this appeal is there anything to show that on October 6, 1975, Vogel knew that *he* was the object of a criminal investigation then being carried on by the Nassau County District Attorney.

In the light of the foregoing it seems clear that the District Court could not have found that Vogel knew that he was the object of an investigation by the District Attorney before he signed the "Settlement Agreement," or before he "performed" it on October 6, 1975. Without such a finding the District Court could not base its decision on such knowledge by Vogel.

III.

Vogel did not "ratify" the "Settlement Agreement."

In disposing of the point made in I above the District Court also stated that the defendants "may be said to have ratified" the "Settlement Agreement" (93a). Obviously, the "ratification" would have had to occur *after* Vogel knew that he was the subject of a criminal investigation by the Nassau County District Attorney. There is no evidence of such knowledge.

Such "ratification" is claimed by the plaintiffs only in the Dannenberg affidavit submitted in answer to Vogel's opposition to the motion for judgment on the basis set forth in Point I (25a). That affidavit seeks to support this claim of ratification by the following:

(a) Under the "Settlement Agreement" Vogel had pledged as collateral security for the performance of his obligations under the "Settlement Agreement" his interest in certain real property in Indianapolis, Indiana (376a). Thereafter there was a default in payment pursuant to a mortgage on that property. In order to avoid the loss of the property in foreclosure, starting in December, 1975, Vogel tried to negotiate a refinancing of that mortgage (26a).

(b) In February, 1976, Vogel negotiated a contract for the sale of 220 acres of land in New Jersey which had been conveyed in escrow pursuant to the "Settlement Agreement" (27a). The Dannenberg affidavit gratuitously, and without foundation, describes this contract only as an effort that "some recovery might eventually be obtained for the plaintiffs * * *" (27a).

None of the above constitutes any "ratification" of the "Settlement Agreement" after knowledge that a defense was available to Vogel. Vogel's activities with respect to the Indianapolis collateral and the 220 acres were undertaken and carried on at a time when he had no knowledge that there was available to him the legal position set forth in Point I (85a). Thereafter such activities cannot be regarded as a "ratification" of the "Settlement Agreement."

Furthermore, in both situations he had a purely personal motive for his activities (85a, 86a):

1. Even if he had known of this defense his actions to protect the Indianapolis collateral would not have been a "ratification" but would have been to preserve that collateral so that he could ultimately get it back after the defense had been upheld.

2. As for the sale of the 220 acres, there he was working as a broker trying to earn for himself a commission of $130,000, as set forth in the last paragraph of the Rider to the contract, carefully omitted from the Dannenberg affidavit, but which reads as follows:

> "The parties hereto agree that Sy Vogel Realty Co. Inc. is the real estate broker that brought about this sale and agree that it shall be entitled to a

> brokerage commission equal to 10% of the purchase price as finally determined which commission shall be paid by the execution and delivery by purchaser of a separate purchase money mortgage in that amount which shall be deducted from the mortgage to be given to the seller herein" (86a).

Indeed, Mr. Dannenberg was so aware that Vogel was earning a brokerage commission that in the original form of the contract, under which the sellers pay the commission, he tried to get Vogel to reduce his commission to 5% (86a).

In the light of the foregoing, the District Court should not have ruled against Vogel on the basis of "performance" or "ratification" of the "Settlement Agreement."

IV.

At the very least, the District Court should have ordered an evidentiary hearing.

In order to reach the result which it did reach, the District Court would have had to make the following factual determinations, solely on the basis of Vogel's two affidavits (14a; 81a) and the Dannenberg and Kanton affidavits (24a; 52a):

1. The threats of criminal prosecution alleged by Vogel (pp. 4-6, above) were never made.

2. Even if they were made, Vogel knew that *he* was the subject of a criminal investigation by the Nassau County District Attorney before July 17, 1975, when Vogel signed the "Settlement Agreement" and before October 6, 1975, when a closing pursuant to the "Settlement Agreement" took place.

3. Even if the above threats were made, Vogel knew in December, 1975 or in February, 1976, that he had a defense to the plaintiffs' motion for judgment based on the threats of criminal prosecution which induced him to accept the "Settlement Agreement."

Unless the District Court was prepared to disbelieve *everything* which Vogel said in his affidavits on this motion (a disbelief for which there would have been no basis), it could not make the above fact determinations, for the following reasons:

1. Vogel's description of specific threats of criminal prosecution on specific occasions were not specifically denied. Kanton's general denial of having made any threats of criminal prosecution, especially in the light of his admission that the Nassau County District Attorney had begun a criminal investigation "in the Spring of 1975" (62a), should have been held to be ineffective. At most, Kanton's denial should have been regarded only as raising an issue of fact as to whether Kanton had actually made those threats. Obviously, this issue could not be determined on the basis of the conflicting affidavits. Therefore, at the very least, the District Court should have held the evidentiary hearing requested in the Vogel affidavits (19a, 88a) in order to enable it to determine the facts.

2. Nowhere in the Record on this appeal is there any basis for a factual determination by the District Court that, either before July 17, 1975, or before October 6, 1975, or before December, 1975, or before February, 1976, Vogel knew that *he* was the subject of a criminal investigation by the Nassau County District Attorney and therefore knew that the "threats" had already been carried out. Without such a factual determination the Dis-

trict Court could not really decide that Vogel had "performed" or "ratified" the "Settlement Agreement" with such knowledge.

There is ample precedent for holding an evidentiary hearing under such circumstances, pursuant to Rule 43 (e) of the Federal Rules of Civil Procedure. *Autera v. Robinson,* 419 F. 2d 1197 (C.A.D.C., 1969), is a case strongly in point because its basic facts are so similar to ours.

There, on a motion by the defendant to enter judgment in accordance with a Settlement Agreement claimed to have been previously reached, the plaintiff opposed the motion on the ground that no such agreement had ever been reached. The District Court held a hearing on the motion, at which only attorneys appeared and spoke. On the basis of this "hearing" and the conflicting affidavits submitted by both sides, the District Court decided the motion in favor of the defendant and entered judgment pursuant to the "Settlement Agreement."

On appeal the Circuit Court of Appeals recognized that "settlement of civil controversies is in high judicial favor." Nevertheless, it reversed and remanded the case for an evidentiary hearing to resolve the issues raised by the conflicting affidavits of the parties. It held that the District Court's "crucial" finding that the Settlement Agreement had been made could be justified "only if the countervailing version [of what had occurred] set forth in appellants' affidavits was completely rejected." The opinion continues:

> "As is evident, that finding was, as it had to be, the product of a selection unbenefited by built-in aids to a discriminating choice. The opportunity

to judge credibility was nonexistent as to the absent affiants; the opportunity to probe by cross-examination was completely lacking. Without these twin tools, normal in the trial of factual issues, the factual conclusion was certain to take on an unaccustomed quality of artificiality.

"Appellees' motion called upon the court to determine whether the parties had mutually assented to settle appellants' negligence claim and, if so, the terms upon which they had agreed. In our view, counsel's statements, the affidavits, and the verified motion stood on substantially the same plane as nontestimonial presentations of fact. As such, *by legal principles with deep roots in antiquity, neither was an acceptable mode of proof of the facts in issue.* We recognize, of course, that trial judges have a discretion to hear and determine ordinary motions either on affidavits or oral testimony portraying facts not appearing of record. We note, however, that *an attempted resolution of factual disputes on conflicting affidavits alone may pose the question whether the discretion was properly exercised.* Much more emphatically do the decisions disapprove factual determinations derived by weighing affidavits when the motion is more than routine.

"* * * The parties on both sides of appellants' lawsuit had valuable interests at stake in the motion proceeding entertained by the District Court. *To the extent that their several representations to the court left issues of fact for determination, they are entitled to an evidentiary hearing*" (419 F. 2d 1197, 1202, 1203). (Emphasis supplied.)

Autera was cited and followed in *Murray v. Kunzig,* 462 F. 2d 871 (C.A.D.C., 1972), reversed on other grounds 415 U.S. 61, 92 S. Ct. 937, 39 L. Ed. 166 (1974). There the Circuit Court said (the quotes are from *Autera*):

"The far better procedure when motions are more than routine is to take oral testimony as to disputed matters of fact. This is because of the

> better opportunity that oral testimony gives the trier of fact to determine credibility. Affidavits deprive him of the opportunity to judge demeanor, and the opportunity to observe 'the chastening process of cross-examination.' 'Without these twin tools, normal in the trial of factual issues, the factual conclusion [is] certain to take on an unaccustomed quality of artificiality.'" 462 F. 2d 871, 877.

Other cases to the same effect are *SEC v. Frank*, 338 F. 2d 486 (C. A. 2, 1968), and *Industrial Electronics Corp. v. Cline*, 330 F. 2d 480 (C.A. 3, 1969).

The District Court should have upheld Vogel's defense to the motion for judgment. At the very least, the District Court should have held the requested evidentiary hearing to determine the factual issues raised by the plaintiffs before deciding the validity of Vogel's defense.

V.

Vogel's opposition was neither frivolous nor interposed to delay judgment.

The District Court was in error when it awarded attorney's fees to the plaintiffs on the ground that Vogel's opposition to the motion "was frivolous and solely for purposes of delay" (93a).

This Brief should certainly persuade this court that Vogel's opposition is far from frivolous and is based on legal and factual arguments which were worthy of consideration by the District Court and are worthy of review by this court.

Furthermore, it is hard to believe that the plaintiffs truly regarded Vogel's opposition as "frivolous." If they

did so regard it, why was it necessary for them to submit affidavits and exhibits in opposition which take up 61 pages of the Appendix on this appeal? And why did they find it necessary to buttress these affidavits and exhibits with a legal memorandum (Record, Item 76) 19 pages long? Obviously, the plaintiffs were concerned about Vogel's opposition and regarded it as serious and substantial. Since Vogel's position was *not* frivolous, the District Court should not have awarded attorneys' fees to the plaintiffs.

As to delay in entry of judgment, that follows necessarily from the assertion of Vogel's defense to the entry of judgment. Delay was not Vogel's motive (82a). Indeed, by raising his defense on this motion he chose the most expeditious way to have it passed on by the court. How much greater delay would there have been if he had proceeded by an independent action, as stated in the Kanton affidavit, and as argued by the plaintiff's counsel in the District Court (Record, Item 76, p. 13).

Furthermore, nowhere in the Record on this appeal have the plaintiffs shown any *actual* delay, in terms of time, nor have they shown any damage which they suffered as a result of Vogel's opposition to their motion for judgment. On this basis, too, it was improper for the District Court to have awarded attorneys' fees to the plaintiffs.

Conclusion

Vogel was induced to accept the "Settlement Agreement" by threats of criminal prosecution and the necessarily implied promise that if he accepted it he would avoid such prosecution. Under settled law, the "Settlement Agreement" is therefore not enforceable.

At the time he executed the "Settlement Agreement," and at the time he "performed" it, at the closing, he did

not know that he was the subject of a criminal investigation by the Nassau County District Attorney. Therefore there was no occasion for him to raise the point of unenforceability at those times. For the same reason, no actions taken by him can be deemed to have been in any way a "ratification" of the "Settlement Agreement." Furthermore, many of his acts alleged to have constitued such "ratification" were actually performed by him for his own benefit, rather than as any carrying out of the "Settlement Agreement."

Because of the plaintiffs' failure to make any specific denials of the specific threats set forth in Vogel's affidavits, and because Vogel had no knowledge that he was being investigated by the Nassau County District Attorney, the District Court should have ruled in favor of Vogel. On the other hand, in the light of the conflicting affidavits before it, the District Court could not have made the fact determinations which it would have had to make in order to decide that Vogel's defense to this motion was not valid. Therefore, at the very least, it should have held an evidentiary hearing to determine such facts before ruling on Vogel's defense to the entry of judgment against him.

Vogel's opposition to the motion for judgment was asserted on a substantial basis and was worthy of the District Court's consideration. Therefore it should not have been regarded by the District Court as "frivolous."

For all of these reasons, this court should now rule that judgment should not have been entered against Vogel on the motion before the court.

Respectfully submitted,

LEON MALMAN
Attorney for Defendant-Appellant Vogel.

376—Affidavit of Service by Mail

United States Court of Appeals
for the second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Karl M. Neimand et al.
Plaintiffs-Appellants

and

George Cooper et al.
Plaintiffs-Intervenors

and

George Schwartz et al.
Additional Plaintiffs-Intervenors

against

Mendon Properties Inc.,
Defendant-Appellant

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Leon Malman, being duly sworn deposes and says that he is the attorney for the above named Defendants-Appellants herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 22nd. day of September, 19 76 he served the within

Brief

upon the attorneys for the parties and at the addresses as specified below

Dean & Falanga
Attorneys for Defendant-Appellant Boklan
1 Old Country Road
Carle Place, New York

by depositing 3 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 22nd.
day of September, 19 76

Raymond J. Braddick

Roland W. Johnson,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Services of three (3) copies of
the within BRIEF is
hereby admitted this 22 day
of SEPT , 1976

Lippes Lowery & Armstrong
Attorney for Plaintiffs